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**IN THE
COURT OF APPEALS OF INDIANA**

CLIFFORD CLEVELAND,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 54A05-0703-CR-135

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas K. Milligan, Judge
Cause No. 54C01-9711-CF-74

September 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After Clifford Cleveland (“Cleveland”) pled guilty and was sentenced for two counts of child molesting as a Class A felony, a panel of this Court reversed and remanded for clarification of his sentence. Upon remand, the convictions were reduced to Class B felonies and Cleveland was sentenced to forty years. Cleveland now appeals his new sentence arguing that the trial court abused its discretion in finding and weighing the aggravating and mitigating circumstances and by resentencing him to the maximum term. The State raises an additional issue claiming Cleveland’s challenges to his sentence are *res judicata* based on his original appeal and therefore not appropriate for review. Concluding that Cleveland’s claims are not *res judicata*, that the trial court properly considered three of the five aggravators—his violation of a position of trust, the nature and circumstances of the crimes, and his criminal history—that the trial court did not err in its assessment of mitigating factors, and that we can say with confidence that the trial court would have imposed the same sentence based on the proper aggravators alone, we affirm the judgment of the trial court.

Facts and Procedural History

In 1994, Cleveland resided in an apartment with his then-wife, Teresa Cleveland (“Teresa”), his son, and Teresa’s eight-year-old daughter, A.S. During this time, while intoxicated and/or high on marijuana, Cleveland repeatedly molested A.S. by forcing her to submit to deviate sexual conduct, including oral sex. While committing these crimes, Cleveland photographed A.S. and kept the photographs. A.S. was aware that Cleveland photographed her.

On November 21, 1997, the State charged Cleveland with four counts of Child Molesting as a Class A felony.¹ Pursuant to a plea agreement, Cleveland pled guilty to Counts I and III, which alleged that he engaged in oral sex with A.S. Counts II and IV were dismissed, and Cleveland and the State agreed that the “executed portion of any sentence imposed shall not exceed 46 years.” Appellant’s App. p. 89.

At Cleveland’s sentencing hearing, he admitted to his criminal history, admitted that he violated a position of trust, and admitted that he photographed A.S. and kept the photographs. The trial court found three aggravating factors: (1) Cleveland’s violation of a position of trust; (2) the nature and circumstances of the crimes; and (3) Cleveland’s criminal history. The trial court also found one mitigator: Cleveland’s cooperation with law enforcement, the court, and counsel. After accepting the plea agreement and concluding that the aggravators outweighed the mitigator, the trial court sentenced Cleveland to consecutive presumptive terms of thirty years for each of the counts of child molesting as a Class A felony and ordered fourteen years suspended, for a total executed sentence of forty-six years.

On May 2, 2005, Cleveland, by counsel, filed a belated notice of appeal. On appeal, Cleveland claimed that the trial court’s sentence violated his Sixth Amendment rights under *Blakely v. Washington*, 542 U.S. 296 (2004), that the trial court improperly weighed aggravating and mitigating factors, and that the trial court erred because it did not specify which sentencing statute it used to determine the length of each imposed presumptive sentence. A panel of this Court agreed with Cleveland as to his third claim

¹ Ind. Code § 35-42-4-3.

and issued a memorandum decision remanding this matter to the trial court for clarification as to which sentencing statute it used to determine the length of each imposed presumptive sentence. *Cleveland v. State*, No. 54A01-0504-CR-186 (Ind. Ct. App. Dec. 14, 2005), *trans. denied, reh'g denied*.

At Cleveland's resentencing hearing, a mistake was discovered with regard to his sentence. That is, Cleveland should have been charged with child molesting as a Class B felony, not as a Class A felony. Thereafter, the State amended Counts I and III, and Cleveland pled guilty to both counts of child molesting as a Class B felony.

Upon resentencing, the trial court identified five aggravating circumstances: (1) Cleveland's violation of a position of trust; (2) the nature and circumstances of the crimes, which included the disparity in age between Cleveland and A.S. and the photographs taken and kept by Cleveland; (3) Cleveland's criminal history, including his 1996 conviction for criminal recklessness as a Class D felony, his two alcohol-related convictions in 1998, and "[t]he fact that [Cleveland] was on probation for the D felony when these charges were discovered," Appellant's App. p. 183; (4) the emotional and psychological impact on A.S.; and (5) the statements and police reports alluding to threats against A.S. Regarding mitigators, the trial court stated:

The only mitigating circumstances that the court can find are that Mr. Cleveland cooperated with law enforcement, he cooperated with his attorney and with the court. Since he has been incarcerated has been [sic] and the court would note that [he] probably sobered up, had a chance to think about this he is remorseful and the court's impressed [with] the things that Mr. Cleveland's done since he's been incarcerated to rehabilitate himself including the involvement in church, the Associate[']s Degree, the Bachelor[']s Degree he's earned and other certificates of accomplishment.

Id. at 182. Concluding that the aggravators outweighed the mitigators, the trial court resentenced Cleveland to the maximum term of twenty years for each count of child molesting as a Class B felony and ordered the sentences to be served consecutively, for an aggregate sentence of forty years. Cleveland now appeals.

Discussion and Decision

Cleveland argues that the trial court abused its discretion when it enhanced his sentence. Specifically, Cleveland maintains that the trial court abused its discretion in finding and weighing the aggravating and mitigating circumstances and in resentencing him to the maximum sentence. The State raises an additional issue claiming Cleveland's challenges to his sentence are *res judicata* based on his original appeal and therefore not appropriate for review. Because the State's claim would be dispositive if correct, we address it first.

I. *Res Judicata*

The State regards Cleveland's arguments as a resurrection of the same arguments already considered and decided by a panel of this Court following his 1998 sentence, and thus maintains that these challenges are *res judicata* and therefore not appropriate for review. We cannot agree. "The doctrine of *res judicata* bars a later suit when an earlier suit resulted in a final judgment on the merits, was based on proper jurisdiction, and involved the same cause of action and the same parties as the later suit." *Reed v. State*, 856 N.E.2d 1189, 1194 (Ind. 2006). Thus, the doctrine of *res judicata* bars repetitious litigation of the same dispute. *Id.*

In 1998, Cleveland was sentenced for child molesting as a Class A felony. He appealed, alleging that the trial court's sentence violated his Sixth Amendment rights under *Blakely*, that the trial court improperly weighed aggravating and mitigating factors, and that the trial court erred because it did not specify which sentencing statute it used to determine the length of each imposed presumptive sentence. A panel of this Court reversed and remanded for clarification of the presumptive sentences.

Upon remand, the trial court determined that Cleveland should have been charged with child molesting as a Class B felony, not as a Class A felony. Cleveland then pled guilty to the Class B felony and was resentenced. As Cleveland was resentenced, under a different charge, we conclude that his arguments are not barred under *res judicata*.

II. Sentence Enhancement

Cleveland argues that the trial court abused its discretion when it enhanced his sentence.² Sentencing lies within the discretion of the trial court. *Powell v. State*, 769 N.E.2d 1128, 1134 (Ind. 2002). We review a trial court's sentencing decision only for an abuse of discretion, including a trial court's decision to increase the presumptive sentence because of aggravating circumstances. *Id.* When a trial court gives an enhanced sentence, it must state the reasons underlying its sentencing decision. Ind. Code § 35-38-1-3. An adequate explanation includes at least three elements: (1) a list of the significant aggravating and mitigating factors, (2) a statement of the specific reason why each factor

² We note that because Cleveland committed his offenses in 1994, we operate under the former presumptive sentencing scheme rather than the current advisory scheme, which did not take effect until April 25, 2005. See *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (explaining that "the long-standing rule" is that "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime").

is aggravating or mitigating, and (3) an evaluation and balancing of the factors. *Scheckel v. State*, 655 N.E.2d 506, 509 (Ind. 1995).

As an initial matter, we note that Cleveland argues that the trial court’s finding of aggravating circumstances violated his rights under *Blakely*, in which the United States Supreme Court stated, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Although Cleveland was originally sentenced in 1998—eight years before *Blakely*—he was resentenced in 2006 and therefore maintains that *Blakely* is applicable. The State does not contest this, so we will address Cleveland’s *Blakely* arguments. “Under *Blakely* a trial court may not enhance a sentence based on additional facts, unless those facts are either (1) a prior conviction; (2) facts found by a jury beyond a reasonable doubt; (3) facts admitted by the defendant; or (4) facts found by the sentencing judge after the defendant has waived *Apprendi* rights and consented to judicial factfinding.” *Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007).

A. Aggravating Circumstances

First, Cleveland contends that the trial court abused its discretion by considering improper aggravators. At Cleveland’s resentencing hearing, the trial court identified five aggravating circumstances: (1) Cleveland’s violation of a position of trust; (2) the nature and circumstances of the crimes, which included the disparity in age between Cleveland and A.S. and the photographs taken and kept by Cleveland; (3) Cleveland’s criminal history, including “[t]he fact that [Cleveland] was on probation for the D felony when

these charges were discovered,” Appellant’s App. p. 183; (4) the emotional and psychological impact on A.S.; and (5) the statements and police reports alluding to threats against A.S. Cleveland does not challenge the aggravator that he was in a position of trust and he admits to photographing A.S. while perpetrating the crime and keeping the photographs.

Cleveland argues that the trial court should not have relied on the victim’s age as part of the nature and circumstances of the crimes to support his enhanced sentences.³ Cleveland is correct that, generally, where a victim’s age is an element of the offense, it may not be considered as an aggravator to support an enhanced sentence. *McCarthy v. State*, 749 N.E.2d 528, 539 (Ind. 2001). However, the trial court may consider the particularized circumstances regarding the factual elements of an offense as aggravating. *Id.* Here, the disparity of ages between Cleveland and A.S. was considered because “Mr. Cleveland at the time was approximately thirty-three years of age . . . and [A.S.] was eight years old.” Appellant’s App. p. 183. It was reasonable for the trial court to consider the molestation of a young child as more egregious than the same behavior toward an older child. *See Brown v. State*, 760 N.E.2d 243, 246 (Ind. Ct. App. 2002) (holding that a court may consider the youth of a seven year old as an aggravating factor even where the age of the victim is an element of the offense). Consequently, the trial court’s consideration of this particularized circumstance was proper.

Next, Cleveland argues that the trial court should not have considered as an aggravating circumstance his previous convictions—a 1996 conviction for criminal

³ Because Cleveland admitted to the age disparity between himself and A.S., *Blakely* does not apply. *See Robertson v. State*, 871 N.E.2d at 286.

recklessness as a Class D felony and two alcohol-related convictions in 1998—claiming his previous convictions and instant Class B felonies “are radically dissimilar, and the connection which can be drawn from alcohol use in virtually all these episodes is too attenuated to form a pattern of consistent criminal behavior warranting an increased incarceration.” Appellant’s Br. p. 12. We disagree. “The significance of a criminal history varies based on the gravity, nature and number of prior offenses as they relate to the current offense.” *Morgan v. State*, 829 N.E.2d 12, 15 (Ind. 2005) (quotations omitted). Cleveland was previously convicted of a felony and two alcohol-related misdemeanors in 1996 and 1998. Cleveland was resentenced for the instant offenses in 2006 and admitted that his alcohol and drug abuse significantly impacted his deviant conduct. Consequently, the trial court did not abuse its discretion in considering Cleveland’s criminal history as an aggravating circumstance.

He also contends that the trial court abused its discretion in considering the fact that he was on probation when charged with the instant offenses.⁴ He highlights that he was not on probation when he committed the offenses but rather was on probation when he was charged with the offenses and therefore argues that consecutive sentences under Indiana Code § 35-50-1-2 were not mandatory.⁵ While it is true that Cleveland was not on probation at the time he committed the offenses, the trial court’s discussion of

⁴ Because Cleveland admitted to being on probation when charged with the instant offenses, *Blakely* does not apply. See *Robertson v. State*, 871 N.E.2d at 286.

⁵ Indiana Code § 35-50-1-2(d) requires that if, after being arrested for one crime, a person commits another crime while on probation, the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

Cleveland later being on probation was in the context of his criminal history. Consideration of a defendant's history of criminal or delinquent behavior is proper when imposing a sentence. *See* Ind. Code § 35-38-1-7.1(a)(2). Consequently, the trial court did not abuse its discretion in considering this as part of his criminal history.

Cleveland next argues that the trial court should not have considered the emotional and psychological impact of this experience on A.S. to support the enhancement of his sentence. Specifically, Cleveland maintains that the trial court abused its discretion in finding this aggravator because “the emotional and psychological effects of a crime are inappropriate aggravating factors unless the impact, harm, or trauma is greater than that usually associated with the crime.” Appellant's Br. p. 9. We must agree. Here the trial court's sentencing statement did not indicate that the psychological effects on A.S. were greater than those usually associated with the molestation of a female child. Consequently, the trial court's reliance on this aggravating factor was improper.

Cleveland next argues that the trial court should not have considered as an aggravator the statements and police reports that alluded to threats being made to A.S. Cleveland maintains that the trial court's reliance on this aggravator violates his Sixth Amendment rights under *Blakely* because “when a trial court, as happened in this case, enhances a sentence beyond the fixed standard term provided by the Code, the aggravating circumstances identified for that enhancement must be either proven beyond a reasonable doubt to a jury, admitted by the defendant, or represent prior criminal convictions.” Appellant's Br. p. 19. We must agree. Here, the trial court relied on alleged statements and police reports alluding to threats against A.S. to enhance

Cleveland's sentence. This was improper because the alleged statements and police reports were not facts found by a jury or admitted by Cleveland. Consequently, the trial court's reliance on this aggravator to enhance Cleveland's sentence was improper.⁶

To summarize, three of the five aggravating circumstances relied upon by the trial court in this case were proper: (1) Cleveland's violation of a position of trust; (2) the nature and circumstances of the crimes; and (3) Cleveland's criminal history.

B. Mitigating Circumstances

Cleveland next argues that the trial court failed to find three significant mitigators. A finding of mitigating factors lies within the trial court's discretion, and the court is not obligated to find that mitigating circumstances exist. *Widener v. State*, 659 N.E.2d 529, 533 (Ind. 1995). When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are indeed mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Haddock v. State*, 800 N.E.2d 242, 245 (Ind. Ct. App. 2003).

First, Cleveland argues that the trial court should have found as a mitigator that he pled guilty. Initially, we note that the trial court did essentially find Cleveland's guilty plea to be a mitigating circumstance when it stated "that Mr. Cleveland cooperated with law enforcement, he cooperated with his attorney and with the court." Appellant's App. p. 182. Furthermore, to the extent that Cleveland contends that the trial court should have assigned more mitigating weight to his guilty plea, it is well established that a plea of guilty does not necessarily constitute a significant mitigating circumstance where the

⁶ The State does not contest Cleveland's argument in this regard.

defendant receives a substantial benefit in exchange for pleading guilty. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*. Here, Cleveland did receive a substantial benefit in return for pleading guilty, namely, the State agreed to dismiss two of the four felony charges. Therefore, the trial court did not abuse its discretion by not assigning this mitigator greater weight.

Second, Cleveland argues that the trial court should have found as a mitigator his troubled childhood. Our Supreme Court has “consistently held that evidence of a difficult childhood warrants little, if any mitigating weight.” *Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000). Therefore, the trial court did not abuse its discretion by failing to find his troubled childhood as a significant mitigating circumstance.

Third, Cleveland alleges that the trial court should have found as mitigators his remorse, sobriety, counseling, and participation in higher education. The trial court did consider these mitigators at Cleveland’s resentencing hearing when it stated:

The only mitigating circumstances that the court can find are that Mr. Cleveland cooperated with law enforcement, he cooperated with his attorney and with the court. Since he has been incarcerated [he] has been and the court would note that [he] probably sobered up, had a chance to think about this he is remorseful and the court’s impressed [with] the things that Mr. Cleveland’s done since he’s been incarcerated to rehabilitate himself including the involvement in church, the Associate[’]s Degree, the Bachelor[’]s Degree he’s earned and other certificates of accomplishment.

Appellant’s App. p. 182. To the extent that Cleveland contends that the trial court should have given more weight to these mitigators, we reiterate the discretion that a trial court maintains in determining the significance and weight to be given to a mitigator. *See Kelly v. State*, 719 N.E.2d 391, 395 (Ind. 1999), *reh’g denied*. The trial court did not

abuse its discretion by giving less weight than Cleveland desired to his remorse, sobriety, counseling, and participation in higher education.

In sum, the trial court abused its discretion by improperly considering as aggravators the emotional and psychological impact of the crimes on A.S. and the statements and police reports alluding to threats made against A.S. Nonetheless, even if a trial court finds improper aggravators, we will affirm the sentence when we can say with confidence that the trial court would have imposed the same sentence if it had considered the proper aggravating circumstances. *See Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002); *Comer v. State*, 839 N.E.2d 721, 725 (Ind. Ct. App. 2005), *trans. denied*. Here, the trial court properly considered as aggravators Cleveland's criminal history, the nature and circumstances of the crimes, and his abuse of a position of trust. In light of these aggravators and the fact that the trial court did not overlook any significant mitigators, we can say with confidence that even if the trial court had not considered the improper aggravators, it still would have imposed maximum, consecutive sentences.

In a separate argument, Cleveland contends that on resentencing "the trial court abused its discretion in finding -- without any further aggravating evidence or adverse change in his circumstances -- that Appellant no longer deserved the presumptive sentence for his offenses and should instead receive punishment enhanced to the maximum extent possible under the law." Appellant's Br. p. 14-15.⁷ In other words,

⁷ Cleveland frames this argument as whether his sentence is manifestly unreasonable. Effective January 1, 2003, our Supreme Court amended Indiana Appellate Rule 7(B) to reflect that an appellate court may revise a sentence if it determines that the sentence is inappropriate in light of the nature of the offense and the character of the offender. This amendment did away with challenges to sentences as "manifestly unreasonable." *See Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005). Because we review this case in 2007, the "inappropriate" sentence test is applied. *See Kien v. State*, 782 N.E.2d 398, 416 (Ind. Ct.

Cleveland argues that the trial court abused its discretion because it did not give him a presumptive sentence at resentencing for child molesting as a Class B felony as he received at his original sentencing for child molesting as a Class A felony. However, the trial court's aggravators are sufficient to justify Cleveland's sentence.

Affirmed.

ROBB, J., and BRADFORD, J., concur.

App. 2003). However, Cleveland has waived this claim on appeal by failing to set forth an argument supported by cogent reasoning. *See* Ind. Appellate Rule 46(A)(8)(a).